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No. 90-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA,
INTERNATIONAL UNION,
AN UNINCORPORATED ASSOCIATION,
BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves the interpretation of provisions of the National Bituminous Coal Wage Agreement ("NBCWA"), a national collective bargaining agreement periodically negotiated between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") for 40 years, and the benefit plans established by those agreements for the purpose of providing health care benefits to retired and disabled coal miners and their dependents.

As the district court noted, this case presented "a straightforward factual dispute" regarding the intent of the parties to those collective bargaining agreements. App. 10a. The question presented was whether the

UMWA 1974 Benefit Plan was obligated to provide benefits to pensioners whose last employers were no longer signatory to a collective bargaining agreement with the UMWA, and therefore no longer legally obligated to provide benefits under the terms of such an agreement. The district court concluded from the evidence, including the language of the documents, the bargaining history of the parties, and the testimony of the negotiators for both sides, that the 1974 Benefit Plan was required to provide benefits under those circumstances.

The issue presented in this case was precisely the question previously decided in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987), cert. den. 485 U.S. 935 (1988), affirming *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556 (S.D.W.Va. 1987), which held that the UMWA 1974 Benefit Plan and Trust was required to provide health benefits to pensioners whose last employers were no longer obligated to provide benefits. A number of other courts have considered the same issue. Without exception, they have reached the same conclusion. *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87), *Grubbs v. UMWA 1974 Benefit Plan*, 723 F. Supp. 123 (W.D.Ark. 1989), *In re Chateaugay*, 111 B.R. 399, 12 EBC 1057, 90 U.S. Dist. Lexis 2484 (S.D.N.Y. 1990), *In re Kaiser Steel Corporation*, No. 87 B 1552 E (Bnkrptcy, D. Colo., bench opinion 2/20/89).

The BCOA, an intervenor in the proceedings before the district court, disagrees with this unanimous judicial construction of the agreements and plan documents. Its argument about the appropriate standard of judicial review of the trustees' refusal to provide benefits is merely an excuse to reargue its interpretation of the facts in this case, an interpretation which differs significantly from the facts found by the district court.

Procedural Background

This Court denied the UMWA 1974 Benefit Plan's petition for certiorari in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust, supra,* on March 7, 1988. Three days later, the trustees of the 1974 Benefit Plan filed a complaint in the Western District of Pennsylvania against the UMWA and several named pensioners as class representatives, seeking a declaratory judgment that the 1974 Benefit Plan was not obligated to provide benefits to pensioners similarly situated to those in *Royal Coal II* outside the jurisdiction of the Fourth Circuit. The BCOA, which participated as *amicus curiae* in *Royal Coal II* before the Fourth Circuit and filed a brief in support of the 1974 Benefit Plan's petition for certiorari, was permitted to intervene in the trustees' declaratory judgment action. That action was eventually consolidated with three other cases filed by the UMWA and various named pensioners in the Western District of Pennsylvania and the Southern District of Ohio, seeking benefits from the 1974 Benefit Plan.

Following a trial on the merits, the district court found that the pensioners were entitled to benefits from the 1974 Benefit Plan, and rejected the arguments of the trustees and the BCOA. The court found that *de novo* review was appropriate pursuant to this Court's holding in *Firestone Tire and Rubber Co. v. Bruch,* 109 S.Ct. 948 (1989), and concluded that the interpretation of the trustees was clearly erroneous. In the alternative, the court also found that the interpretation of the trustees was arbitrary and capricious under the abuse of discretion standard of review.

The district court also concluded that the trustees were precluded from relitigating the issue of their liability in view of the final judgment in *Royal Coal II.*[1]

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[1] The courts in *Grubbs v. UMWA 1974 Benefit Plan, In re Chataeaugay,* and *In re Kaiser Steel Corporation, supra,* also found that the trustees were precluded, although in each case the court also reached and decided the merits of the dispute.

The 1974 Benefit Plan did not appeal the ruling of the district court. The BCOA, as intervenor, appealed to the Third Circuit, which affirmed the decision of the district court without opinion. Notwithstanding the unanimous findings of two circuits and five district courts, BCOA now asks this court to reexamine the facts once again.

Factual Background

The district court summarized the bargaining history regarding these benefits in great detail in its findings. Since 1950, retired UMWA coal miners have received lifetime health benefits with their retirement pensions.[2] From 1950 to 1974, those benefits were provided by a single multiemployer trust, the United Mine Workers Welfare and Retirement Fund of 1950. Until 1974, the trustees had complete authority to set benefit levels and to establish and interpret eligibility requirements.

In the 1974 NBCWA, the trust was split into two benefit trusts and two pension trusts, designated the 1950 Pension and Benefit Plans and the 1974 Pension and Benefit Plans, respectively. The 1974 Benefit Plan provided health benefits to active miners and post-1975 retirees. The 1974 Agreement extended lifetime health benefits to widows,[3] and included a summary of benefits which provided that a retired miner would retain a health card "until death" and a widow "until her death or remarriage." App. 16a-17a.

The 1974 Agreement also resulted in a drastic change in the scope of the trustees' discretionary authority. The parties agreed to specify the benefits to be provided and the eligibility criteria in the agreement and plan docu-

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[2] The petitioner's eligibility for benefits was not affected by whether his last employer ceased operations, went out of business, or failed to become signatory to successor agreements. App. 16a.

[3] See, *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

ments and the trustees no longer had the discretionary authority to establish eligibility standards or to construe the terms of the trust. Finding 47, App. 30a.

In the 1978 Agreement, after the two benefit plans suffered a shortfall in contributions and were forced to cut benefits, the parties agreed to a substantial restructuring of the health care delivery system for active employees and post-1975 retirees. The agreement contained three fundamental elements. First, the UMWA agreed to the establishment of individual employer benefit plans as the primary mechanism for health care delivery, with each employer providing benefits to its active employees and to retirees last employed by such employer. In exchange for that concession, the BCOA agreed to retain the 1974 Benefit Plan as a "safety net" for the purpose of providing benefits to existing and future "orphaned" pensioners, and also agreed to guarantee unconditionally the solvency of the four multiemployer trusts, to ensure that benefits would be paid at the agreed levels. The district court specifically found no evidence of any intent to alter the nature of the benefits provided or to exclude some pensioners from coverage as a result of the change in the delivery system. Findings 42, 44, App. 27a-29a.

Significantly, the BCOA attempted to remove from the 1978 Agreement the language referring to the lifetime duration of retiree health benefits. It proposed language that omitted all reference to lifetime benefits. The UMWA refused to agree to the deletion and language was reinserted in the summary of plan benefits, in several places, providing that a retired miner would retain a health card "for life" and a widow "until her death or remarriage." Finding 21, App. 19a.

The district court found from this history and the language of the agreement a clear intent to provide lifetime benefits to retired miners and their widows, as a vested benefit. Finding 40, App. 27a. This finding is fully in accord not only with the other courts which have con-

strued the NBCWA with respect to these benefits, including *Royal Coal II* and the other cases cited *supra*, but with a larger body of case law which holds that whether retiree benefits are vested lifetime benefits is a question of the intent of the parties, to be determined from the language of the agreements and the bargaining history of the parties. See, *International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. den. 465 U.S. 1007 (1984), *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987).[4] The language of this particular collective bargaining agreement is remarkable primarily in the clarity with which that intent is expressed.[5]

The district court found that although the intent to provide lifetime benefits was clear and unambiguous, the collective bargaining agreements and plan documents were ambiguous with respect to whether the employer, through its individual employer benefit plan, or the 1974 Benefit Plan was obligated to provide benefits to retirees where the employer is no longer signatory to the collective bargaining agreement. Finding 41, App. 27a.

The BCOA suggests in its petition that the district court's decision permits employers still in the coal business to dump their retirees into the plan, to obtain health care financed by their competitors. This suggestion is misleading in several respects.

BCOA does not contend that the last employers of the pensioners affected by this case are responsible for providing their health benefits. Those employers have no

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[4] See, generally, J. Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 Ind. Rel. L. J. 183 (1987).

[5] Of the numerous cases finding a right to lifetime retiree health benefits, only *Policy v. Powell Pressed Steel*, 770 F.2d 669 (6th Cir. 1985) contains a comparably unambiguous expression of intent to create a lifetime benefit (pensioners would receive coverage "during the lifetime of the pensioner").

legal obligation to provide benefits to their retirees. The issue of the employer's obligation to provide retiree benefits after the expiration of the collective bargaining agreement has been fully litigated in a number of cases. Without exception, the courts construed the agreements to limit the obligation of the employer to provide benefits to the term of the contract, and to place the obligation to provide benefits thereafter on the 1974 Benefit Plan. *District 17, UMWA et al. v. Allied Corporation*, 735 F.2d 121 (4th Cir. 1984), on reh. *en banc*, 765 F.2d 413 (4th Cir. 1985), cert. den. 473 U.S. 905 (1985), *District 29, UMWA et al. v. Royal Coal Company (Royal Coal I)*, 768 F.2d 588 (4th Cir. 1985), *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D.Ala. 1986), *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87), *District 2, UMWA v. G. M. & W. Coal Company*, 7 EBC 1105 (W.D. Pa. 1986).

The UMWA has proposed contract language which would have prevented the "dumping" BCOA criticizes. In negotiations for the 1984 Agreement, following the first significant decision on this issue, the panel decision in *Allied*, the UMWA proposed language which would have made it clear that the employer's responsibility for retiree health benefits continued beyond the expiration of the contract. The BCOA refused to agree to that language *because it agreed with the portion of the Allied decision limiting the employer's obligation to the term of the agreement.* Finding 32, App. 23a. The BCOA wants it both ways—they wish to limit their own liability to the term of the agreement, but object to the 1974 Benefit Plan being required to assume the obligations of other employers, most of them former BCOA members, when they take advantage of that limitation.

The BCOA's complaint of unfairness in being required to collectively shoulder responsibility for these individuals

is overstated in other respects as well. The 1974 Benefit Plan is funded by contributions from all employers signatory to the NBCWA, not solely employers who are members of the BCOA. Many employers signed "me-too" agreements binding themselves prospectively to the terms of the national agreement, and many others sign the national agreement once it is negotiated between the UMWA and the BCOA. Of the eight employers involved in this case, five are former BCOA members, and all eight were signatory to the 1978 Agreement and paid royalties into the 1974 Benefit Plan during the term of that agreement.[6]

Not only was the BCOA in full agreement with the decisions limiting the obligation of the employer to the term of the agreement, but the trustees themselves adopted those rulings and issued dozens of decisions holding that the obligation of the employer was limited to the term of the collective bargaining agreement to which it was signatory.[7]

The true position of the BCOA is not that the last employers of these pensioners were obligated to provide their benefits, but that they were not entitled to benefits from anyone, despite the unambiguous promise of benefits "for life."

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[6] During the term of the 1978 Agreement, the 1974 Benefit Plan was funded by a royalty of 2 cents per hour. That rate proved more than sufficient to provide benefits to orphaned pensioners for more than ten years. No contributions were required during the term of the 1981 or 1984 agreements. The eight employers involved in this case, and others similarly situated, contributed to the plan at the same rate as other signatory companies. Those contributions have provided benefits to "orphans" from other companies since 1978.

[7] Finding 34, App. 24a. The trustees, as trustees of the 1950 Benefit Plan, are contractually designated as arbitrators of health benefit disputes arising between employees or pensioners and their employers.

Prior to the expiration of the 1984 Agreement, several decisions construed the agreements and plan documents to require the 1974 Benefit Plan to provide benefits to pensioners where their last employer was no longer signatory to the collective bargaining agreement and no longer obligated to provide benefits, including *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987), affirming *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556 (S.D.W.Va. 1987), the panel decision in *District 17, UMWA et al. v. Allied Corporation*, 735 F.2d 121 (4th Cir. 1984),[8] *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), and *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87).

The district court also found it highly significant that the BCOA did not seek changes in the collective bargaining agreement during the 1988 negotiations, in the face of the unanimous judicial construction of the 1984 Agreement holding that retirees were entitled to benefits for life, that the obligation of the employer was limited to the term of the agreement, and that if the last employer was no longer obligated to provide benefits, the 1974 Benefit Plan must assume that responsibility. The readoption of language in the 1988 Agreement which had been extensively interpreted by the courts strongly suggests that the parties incorporated that judicial interpretation into their contract. Finding 46, App. 31a. *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 222 (1979), *Galgay v. Gil-Pre Corporation*, 864 F.2d 1018 (3rd Cir. 1988).

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[8] The *en banc* court, on rehearing, held the employer liable based upon its breach of the successorship clause of the agreement and did not reach the issue of the 1974 Benefit Plan's obligation, but indicated in a footnote its adherence to the panel's view that the 1974 Benefit Plan would be obligated if the employer were not. 765 F.2d 413 (4th Cir. 1985).

During the 1988 negotiations, the parties were quite aware of the fact that additional pensioners would become the responsibility of the 1974 Benefit Plan by virtue of *Royal Coal II* and similar decisions. They knew that some employers had ceased operations and indicated that they did not intend to resume operations or to become signatory to the successor agreement.[9] They spent a considerable amount of time discussing the contribution rate necessary to fund the 1974 Benefit Plan, considering the additional pensioners who might become the responsibility of the 1974 Benefit Plan during the term of the 1988 Agreement.

The BCOA proposed a contribution rate of 8 cents per hour. The UMWA felt that the proposed 8 cent rate was inadequate, projecting that an 18 to 22 cent increase would be necessary to pay benefits and preserve the corpus of the trust. Ultimately, the UMWA agreed to the BCOA's proposed rate only because the BCOA agreed to continue the guarantee of benefits negotiated in the 1978 agreement, and continued in the 1981 and 1984 Agreements, which obligated them to fund the 1974 Benefit Plan to the extent necessary to provide the benefits.

As the district court found, the BCOA

> preferred to maximize cost savings by minimizing the initial contribution rate and providing additional funding later under the guarantee clause if necessary. Findings 37, 38, App. 25a-26a.

They made the same choice with respect to the 1950 Benefit Plan, and have found it necessary to increase the contribution rate for that Fund pursuant to the guarantee clause. Finding 38, App. 26a.

This litigation is largely an effort by the BCOA to avoid the obligations it knowingly undertook in the 1988 Agreement.

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[9] At least two of the employers involved in this case, Barnes & Tucker Co. and Y. & O. Coal Company, were specifically discussed. Finding 36, App. 25a.

SUMMARY OF THE ARGUMENT

The district court found that the position of the trustees was clearly wrong under either a *de novo* or an arbitrary and capricious standard of review. The BCOA's argument that there is confusion and conflict among the circuits on the appropriate interpretation of *Firestone v. Bruch* is without substance.

In this case, *de novo* review was appropriate, because the trustees do not have discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Nothing in the collective bargaining agreements or plan documents grants them such authority, and the bargaining history shows that their discretionary authority was eliminated in the 1974 Agreement.

Regardless of which standard of review is appropriate, the decision of the district court is clearly supported by the evidence, and was properly affirmed by the Court of Appeals.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE STANDARD OF REVIEW IN THIS CASE WAS *DE NOVO* REVIEW

The district court correctly determined that the appropriate standard of review of the Plan's denial of benefits was *de novo* review, under the standards established by this court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. ——, 109 S.Ct. 948 (1989).[10] *Firestone* held that the standard of review of trustees' denial of benefits under an ERISA plan is presumptively *de novo*, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

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[10] The trial court also found that even if the standard of review is abuse of discretion, the decision of the trustees was arbitrary and capricious, as discussed *infra*.

That standard requires the trial court initially to determine whether the trustees have the type of discretionary authority which warrants a more restrictive standard of review. The district court found that the trustees have no such authority. Findings 47, App. 30a. That determination is clearly supported by the evidence in this case, as discussed at part II, *infra*.

A. There is No Conflict Among the Circuits in Applying the Standards Established in *Firestone*.

Faced with the complete unanimity of the courts which have decided the real issue involved in this appeal, the proper construction of these collective bargaining agreements and trust documents, the BCOA seeks a conflict warranting this Court's attention among the decisions of the courts of appeals since *Firestone*, construing the language of various benefit plans to determine the appropriate standard of review.

This alleged conflict between the circuits is entirely illusory. BCOA offers in support of this proposition merely different results from courts applying the same standard to different benefit plans, with different provisions and different histories. The courts must determine the appropriate standard of review on a case by case basis, construing the language and history of the specific plan at issue.

Certain principals have emerged from those decisions. One such principal is that the "discretionary authority to determine eligibility for benefits or to construe the terms of the plan" referred to in *Firestone* obviously means something more than the power to decide whether a particular beneficiary met the eligibility requirements to receive benefits. Someone must process claims and make decisions to grant or deny benefits based upon existing eligibility standards, and that authority must ultimately rest with the trustees or administrator of the plan. If that authority were sufficient to warrant a

higher standard of review, the *Firestone* standard would be meaningless, because all trustees exercise some degree of discretion in applying the provision of the plan to applications for benefits and approving or denying claims. This Court rejected Firestone's argument that an arbitrary and capricious standard should apply to its decision to deny benefits because a plan fiduciary by definition exercises some discretion.

In *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), the Court of Appeals for the Eighth Circuit stated:

> Language requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan. . . .
>
> Paragraph 16.01 of the Fund's plan provides that the trustees have the final authority to determine all matters of eligibility for the payment of claims. As noted above, this section merely describes the trustees' mandatory role in accepting or rejecting claims. It does not grant to the trustees the authority to construe ambiguous terms. We have carefully reviewed the plan and could find no other provision in the plan specifically giving the trustees the discretionary power to interpret the subrogation clause.

The Fourth and Eleventh Circuits have also held that the authority to determine whether a claimant meets the eligibility standards is not sufficient to warrant a more restrictive standard of review. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989), cert. den. 110 S.Ct. 281 (1989), *Baker v. Big Star Division of the Grand Union Company*, 893 F.2d 288 (11th Cir. 1989).

The courts have generally found the "arbitrary and capricious" or "abuse of discretion" standard appropriate only where the plan expressly gives the trustees discretionary authority to construe the plan. *Moon v.*

American Home Assurance Company, 888 F.2d 86 (11th Cir. 1989), *Brown v. Ampco-Pittsburgh Corporation*, 876 F.2d 546 (6th Cir. 1989) ("Absent a clear grant of discretion to the administrator, application of the highly deferential arbitrary and capricious standard of review does not promote" the goals of ERISA).

Where the plan clearly grants such authority, the courts have applied the arbitrary and capricious standard. *Batchelor v. IBEW Local 861 Pension and Retirement Fund*, 877 F.2d 441 (5th Cir. 1989) (Trustees "have full and exclusive authority to determine all questions of coverage and eligibility . . . full power to construe the provisions of this Agreement [and] the terms used herein"; authority to "interpret the Plan and determine all questions arising in the administration, interpretation, and application of the plan."); *Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522 (5th Cir. 1989) (Plan Committee has power to "interpret and construe" plan, "to determine all questions of eligibility and status" under plan, and committee determinations binding on all persons); *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37 (11th Cir. 1989) (trustees have "full and exclusive authority to determine all questions of coverage and eligibility", "full power to construe the provisions of the trust").

In the absence of such express grants of authority, the *Firestone de novo* standard has been followed. *Ulmer v. Harsco Corporation*, 884 F.2d 98 (3rd Cir. 1989), *Sejman v. Warner-Lambert Company*, 889 F.2d 1346 (4th Cir. 1989), *Aubrey v. Aetna Life Insurance Co.*, 886 F.2d 110 (6th Cir. 1989), *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327 (8th Cir. 1989).

BOCA's purported conflict among the circuits rests upon the Fourth Circuit's observation in *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989) that there are "no magic words required to trigger the application of one or another standard of review." It is doubtful

that any court would disagree with that observation. However, the plan in *De Nobel* clearly gave the trustees the "power to resolve all questions pertaining to . . . *interpretation* and application of the plan." (Emphasis added.) The *De Nobel* result is entirely consistent with this Court's holding in *Firestone* and with the cases decided by the courts of appeal since that decision, including *Baxter v. Lynn, supra.* The conflict is nonexistent, and the courts of appeal are not confused about the proper application of *Firestone.*

B. Nothing in the Collective Bargaining Agreements or Trust Documents Gives the Trustees Discretionary Authority to Determine Eligibility or to Construe the Terms of the Trust.

The district court examined the collective bargaining agreements, trust documents, and the evidence of the trustees' authority, particularly the changes in 1974, and found nothing which conferred upon the trustees the authority to interpret the plan or construe disputed provisions.

The BCOA cites three provisions of the collective bargaining agreement and one provision of the benefit plan itself in support of its argument that the trustees of the UMWA 1974 Benefit Plan and Trust were granted the discretionary authority to construe or interpret the terms of the plan that would warrant review under the arbitrary and capricious standard. It made the same arguments to the district court and the court of appeals. None of these provisions, cited at pp. 16-17 of the petition, lend any support to BCOA's position.

The language of the collective bargaining agreements and plan documents does not expressly give the trustees authority to construe or interpret the terms of the plan, or to make "final determinations" about eligibility, or discretion to determine what the eligibility requirements for benefits will be.

The weakness of BCOA's argument in support of a higher standard of review is revealed by the fact that the only use of the word "discretion" it could locate has nothing to do with eligibility determination or the power to construe the plan. Article XX(e)(4) of the NBCWA is simply a routine grant of administrative authority to the trustees, authorizing them to use their discretion in determining how, when, or whether to sue to enforce the obligations of the employers, without arbitrating such disputes.

The second provision, Article XX(g)(3) is similarly a routine grant of administrative authority, authorizing the trustees to "police" the rolls and remove ineligible persons.[11]

The third provision cited, language in Article III of the benefit plan, also deals with administration, stating that

> [s]ubject to the provisions of the 1974 Benefit Trust, the trustees shall have full authority, within the terms and provisions of the Labor-Management Relations Act of 1947 and other applicable law with respect to *administration* of coverage and eligibility, methods of providing or arranging for provisions of benefits, investment of trusts funds, and all other related matters. (Emphasis added).

Again, this is simply a grant of administrative authority to manage the trust and make eligibility decisions.

The final provision relied upon by the BCOA is language in the collective bargaining agreement that the Trustees "shall determine . . . when an employer is no longer in business." This is the authority to make a factual determination as to whether an employer is no longer in business, in the same sense that they have the authority to decide if an individual claimant is eligible. All

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[11] Section (g) of Article XX is entitled "Administration of Trusts".

trustees must make factual determinations about whether the criteria of the Plan are met. Authority to make decisions about applications is not sufficient to bring the trustees within the exception to *de novo* review recognized by this Court. *Baxter v. Lynn, supra, Dzinglski v. Weirton Steel Corp., supra, Baker v. Big Star Division of the Grand Union Company, supra.*

The BCOA places primary reliance on the decisions of the Fourth Circuit in *Boyd v. Trustees of United Mine Workers Health and Retirement Funds*, 873 F.2d 57 (4th Cir. 1989) and *Richards v. UMWA Health and Retirement Fund*, 895 F.2d 133 (4th Cir. 1990), in which the court held that the trustees of the 1974 *Pension* Plan had discretionary authority and that an abuse of discretion standard was appropriate.[12] The court relied on language in the 1974 Pension Plan stating that the trustees had "full and final determination as to all issues concerning eligibility for benefits." Crucially, there is no language in the 1974 *Benefit* Plan which gives the trustees the power of "full and final determination as to all issues concerning eligibility." The only language BCOA has pointed out in Article III of the 1974 Benefit Plan is a general grant of authority to administer the trust.[13]

The question of the proper standard of review was specifically litigated in this case. The district court found that "[n]othing in the collective bargaining agreements or plan documents prescribes a more stringent standard" than *de novo* review.

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[12] Both cases involved a claims for disability pensions. In such cases, an eligibility determination involves substantial factual issues of disability and causation, necessarily entailing a greater degree of discretion. Nevertheless, in both cases the court found that the decision of the trustees was an abuse of discretion, and ruled in favor of the claimant.

[13] The *Allied* case, also cited in support of the proposition that the trustees had discretionary authority to interpret the trust, was decided four years before *Firestone* under the arbitrary and capricious standard, and lends no support to the BCOA's position.

C. The Bargaining History Demonstrates That the Trustees No Longer Had Discretionary Authority To Determine Eligibility Standards for the 1974 Benefit Plan After 1974.

From the establishment of the UMWA Funds in 1950 until 1974, there was a single United Mine Workers Welfare and Retirement Fund of 1950, governed by three trustees. The trustees had virtually complete discretion with respect to the benefits provided by the Funds. Acting by formal resolutions, the trustees established the pension and health benefits to be provided by the Fund, and modified those benefits from time to time. They established, and changed on numerous occasions, the eligibility requirements for benefits, and had a free hand in interpreting those requirements. None of those benefits were set forth in the collective bargaining agreements, which merely required signatory employers to contribute to the Funds at a given rate. The trustees created, modified, and interpreted benefits, benefit levels, and eligibility requirements at their discretion. Finding 15, App. 16a.

In the 1974 NBCWA, for the first time, the benefits to be provided were specified in the collective bargaining agreement itself and in the plan documents. The trusttees' discretionary authority to set eligibility standards for benefits was removed. Thereafter, those standards were fixed in the agreement and plan, and the trustees were charged with administering those standards. Finding 18, App. 17a.

This history was recounted by Justice Stevens in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982):

> The 1950 collective bargaining agreement established a fund to provide pension, health, and other benefits for certain miners and their dependents. That agreement defined the operators' obligation to contribute to the fund but delegated the authority to define the

> amount of benefits and the conditions of eligibility to the trustees of the fund. . . .
>
> In 1974, because of their concerns about compliance with [ERISA] and about the actuarial soundness of the 1950 fund, the union and the operators agreed to restructure the industry's benefit program. They agreed that the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in the collective bargaining agreement.

454 U.S. at 564-566.

Prior to 1974, the trustees had the type of discretionary authority contemplated by *Firestone*. When the Court stated that the proper standard was *de novo* review "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan", it was referring to the type of authority the trustees had prior to 1974. "Discretionary authority to determine eligibility for benefits" means the authority to decide what the eligibility requirements *are*, not just the authority to decide whether a particular claimant meets requirements established by the settlor and set forth in the trust documents. It is the discretionary authority to set and change the eligibility standards themselves that warrants a higher standard of review.

BCOA also argues that two practices of the trustees support their argument that the trustees have discretionary authority. One is the former practice of developing "Q & A's" on recurring questions for the guidance of funds staff in making eligibility determinations. Although, a few "Q & A's" were developed during the term of the 1978 Agreement, the practice was discontinued entirely during the 1981 Agreement. Moreover, the particu-

lar "Q & A" cited, H-16, was rejected by the settlors in the 1981 agreement.[14]

The second practice, auditing employers who claim to be out of business and making decisions about whether they are no longer in business, is an administrative function in the same sense as decisions about whether an individual claimant meets the eligibility requirements of the plan. It is a function which necessarily involves some discretion, but not the discretionary authority to construe or interpret the plan.

The audit function is necessary to determine when the trustees assume the retiree obligations of a failed employer who is still signatory to the agreement, and thus legally obligated to provide benefits, but is unable to do so. As the district court found, it is irrelevant when the employer is no longer legally obligated to provide benefits.

In this case, the trustees no longer had the discretionary authority to determine eligibility for benefits after 1974, and nothing in the collective bargaining agreement or the trust document gives them the authority to construe the terms of the trust. The district court correctly held that *de novo* review was the appropriate standard in this case.

II. THE DECISION OF THE DISTRICT COURT WAS SUPPORTED BY THE EVIDENCE UNDER EITHER STANDARD OF REVIEW.

BCOA argues that the district court applied the wrong standard of review in this case in the hope that this issue may provide one more opportunity to retry the facts before this Court.

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[14] Funds staff attempted to develop a replacement "Q & A" in 1981 and early 1982, but never completed the process. The practice itself was abandoned soon thereafter.

Even if the Court should determine that the appropriate standard of review in this case is the abuse of discretion or arbitrary and capricious standard, the district court found in the alternative that the decision of the trustees to deny benefis to the pensioners in this case was arbitrary and capricious. Findings 47, 50, 51, App. 11a, 30a-31a.

As noted by the district court, the position of the trustees was also held to be arbitrary and capricous by the courts that addressed the issue prior to *Firestone*, applying the arbitrary and capricious standard then followed by most of the circuits. *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556, 1567 (S.D. W.Va. 1987), affirmed *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), cert. den. 485 U.S. 935, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988), *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Grubbs v. UMWA 1974 Benefit Plan and Trust*, 723 F. Supp. 123 (W.D.Ark. 1989).

A. The District Court Correctly Found that the Parties Intended to Confer a Vested Right to Lifetime Health Benefits.

Although ERISA does not impose any minimum vesting requirements with respect to employee welfare benefit plans, the statute evidences no intent by Congress to endorse unfettered termination of benefits such as those provided pursuant to the NBCWA. This court has said, in a case involving the same benefits at issue here, that retiree health benefits may be vested, and if they are vested, may not be altered without the consent of the retiree. *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562, n.14 (1982), *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Whether pensioners are entitled to health benefits as a vested, lifetime benefit depends upon the intent of the

parties to the collective bargaining agreement which creates the benefit.[15]

The past five collective bargaining agreements between the UMWA and the BCOA, provide that a pensioner "will be *entitled* to retain a health services card *for life.*" (Emphasis added). It is difficult to perceive how an intent to create a lifetime benefit could be expressed more clearly. The district court, and the other courts that have previously addressed the issue, found that the quoted language and the history of these benefits clearly demonstrated the intent of the parties to confer a right to benefits for the lifetime of the pensioner. Finding 40, App. 27a. *District 29, UMWA v. UMWA 1974 Benefit Plan*, 826 F.2d 280, 282-283 (4th Cir. 1987), *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556, 1563 (S.D.W.Va. 1987), *Crockett v. Vecellio & Vecellio & Grogan, supra, Grubbs v. UMWA 1974 Benefit Plan*, 723 F. Supp. 123, 127 (W.D.Ark. 1989).

The argument of the BCOA that this language is meaningless is untenable. The BCOA's chief negotiator testified at trial that BCOA had attempted, without success, to remove that language "many times," including the attempt to remove it from the 1978 Agreement. If the health services card referred to in the summary "no longer exists" as a result of the 1978 negotiations, the current version of the "for life" language would not have been reinserted in the 1978 Agreement at the insistence of the UMWA after it was omitted from a BCOA draft. Finding 21, App. 19a. A general disclaimer that the

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[15] See, *International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. den., 465 U.S. 1007 (1984), *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987), *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *Local Union No. 150A, UFCW v. Dubuque Packing*, 756 F.2d 66 (8th Cir. 1985), *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988).

description of benefits included in the contract is "subject to more detailed information" in the plan is insufficient to nullify the clear promise of benefits for these pensioners.[16]

B. The Position of the BCOA is Inconsistent With the Intent to Provide Lifetime Benefits.

The district court recognized that there is an irreconcilable contradiction between the clearly expressed intent to provide lifetime benefits in the collective bargaining agreements and the position taken by the trustees and the BCOA. The BCOA's interpretation of the agreement would effectively defeat the clear intention of the parties to provide lifetime benefits. Finding 51, App. 31a.

This fundamental contradiction is inescapable. These pensioners last worked and retired at a time when their employer was still signatory to the NBCWA. At that point, they had done everything necessary to qualify for their retirement benefits. They had earned their pensions and health benefits by their years of service in the coal industry, and under the plain language of the agreements, had every right to expect that they would receive them. Those benefits were fully vested.

The BCOA relies entirely upon language first included in the 1981 Agreement providing that an employer is considered "no longer in business" only if it has ceased

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[16] The words "for life" or their equivalent appear eight times in each agreement, describing benefits for different categories of beneficiaries. The "General Description of Plan Benefits" is included in the collective bargaining agreements as an appendix to Article XX, the article creating and funding the pension and benefit plans. Tentative agreements reached between the UMWA and BCOA are submitted to the union membership for ratification by the rank and file, and copies of the agreements with highlighted changes, are distributed for review prior to the ratification vote. BCOA's position is evidently that the apparent promise of lifetime benefits contained in those agreements is merely a cynical deception to win approval of those agreements.

mining operations and is financially unable to provide benefits. App. 13a-14a. It interprets that language to deny coverage to pensioners whose employers may be able to provide benefits, regardless of whether the employer is legally obligated to do so, in effect working a forfeiture of benefits from any source for those retirees whose employers cease mining operations, cease employing UMWA members, and do not become signatory to successor collective bargaining agreements.

The district court rejected the BCOA's interpretation of that language, finding that the intent of the provision was to protect the 1974 Benefit by insuring that responsible employers fulfilled their obligations to provide benefits during the term of the agreement, but not to create gaps in coverage where pensioners would lose their benefits because neither the employer nor the 1974 Benefit Plan was obligated to provide them. Findings 29, 43, App. 22a, 28a.

The district court found that

> It is clear that both parties, in adopting the language, presupposed that the employer was obligated to provide benefits and intended to ensure during the term of the agreement that the employer rather than the 1974 Benefit Plan would pay benefits unless unable to do so. Our conclusion is reinforced by the fact that the "no longer in business" clause refers to *signatory* employers, indicating that the 1974 Benefit Plan must provide benefits to retired miners who
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> > . . . would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory employer, including successors and assigns . . . is no longer in business.
>
> A signatory employer is obligated to provided benefits for the term of the contract to which it is signatory regardless of whether it has any operations covered by the contract, i.e., coal mining operations. App. 28a-29a.

The position of the BCOA is that those benefits are forfeited because their employer is no longer signatory to a collective bargaining agreement with the union, an event which occurred after their retirement and which was entirely beyond their control.

If the Agreements contemplate that possibility, then no pensioner would ever be "entitled to a health services card for life." A pensioner's benefits would always be limited, contingent, and subject to forfeiture at any time. He would have no assurance of receiving what the agreements promise.

The BCOA's interpretation presupposes that at some point in the history of the collective bargaining relationship between the UMWA and the BCOA, the Union agreed to this fundamental change in the nature of these benefits. For some 28 years prior to 1978, those benefits were provided for life. The district court found nothing in the 1978 or 1981 agreements or the bargaining history which indicated any intent to make such a drastic change in the nature of the benefits provided by the agreement. Indeed, the assurance that only the delivery mechanism was being changed and not the nature of the benefits themselves was a vital element of the 1978 Agreement. The court found no persuasive evidence of any intent to cause a forfeiture of benefits under these circumstances. App. 27a-28a.

The BCOA's position also requires the assumption that the Union agreed to condition the receipt of vested benefits upon the financial condition of a pensioner's last employer, regardless of whether that employer was obligated to provide benefits. That assumption makes no sense. As the court observed in *Grubbs v. UMWA 1974 Benefit Plan, supra,*

> In light of the decades of history of the intent of the parties which were relied upon in establishing the current benefit and pension scheme to provide for disabled and retired miners in the twilight of their

> lives, it is obvious that none of the interested parties intended to condition the receipt of benefits on facts completely irrelevant to the receipt of the benefits. To condition receipt of pension and health benefits on the financial condition of an employer that has no legal obligation to pay those benefits is as incomprehensible as rendering the fruits of lifelong toil contingent upon the amount of annual rainfall in Siberia.

The district court found no support in the record for that contention. Finding 43, App. 28a-29a.

C. Review by This Court is Not Necessary to Preserve the Existence of the Plan.

BCOA's final assertion is that the district court's decision will, sooner or later, destroy the 1974 Benefit Plan. That assertion is without foundation.

While the crisis of escalating health care costs is real enough, particularly in basic industries with large numbers of retirees entitled to health benefits and declining employment, that problem may be beyond the ability of private parties to resolve in their collective bargaining agreements.[17] However, to the extent that such agreements can anticipate and make provisions for adequate funding, the parties to the NBCWA have done so.

The UMWA negotiated the guarantee of benefits in 1978 specifically to ensure that pensioners received the benefits to which they were entitled. The BCOA agreed to renew that guarantee in the 1981, 1984, and 1988 Agreements, although frequently taking the initial position during negotiations that it would no longer agree to guarantee benefits.

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[17] The Dole Commission is currently examining the long term problems of providing health care in the coal industry. The 1950 Benefit Plan is a much larger problem than the 1974 Plan, with some 110,000 beneficiaries, ten times the size of the 1974 Plan.

The immediate funding crisis in both the 1950 and 1974 Benefit Plans is entirely manufactured by the BCOA, by its refusal to honor its unconditional guarantee and increase contributions to a level adequate to fund the benefits. Although fully aware of the plans' actual and potential liabilities, it chose to minimize the initial contribution rate in the agreement, promising to provide additional funding as required.[18] It has refused to provide that funding, requiring the trustees to sue to enforce the guarantee.[19]

BCOA further argues that the district court's decision will encourage "dumping" of retiree obligations on the 1974 Benefit Plan by some employers. The Union made proposals in both 1984 and 1988 to prevent that problem. The proposals offered in 1984 would have placed the obligation to provide these benefits on the very employers the BCOA now complains are "dumping" their obligations on the 1974 Benefit Plan. The BCOA employers declined to agree to that proposal because they wanted to limit their own liability to the term of the agreement. In 1988, the Union proposed and the BCOA accepted contractual provisions for withdrawal liability for employers who withdraw from participation in the 1974 Benefit Plan. To the extent that the problem exists, it has been created largely by the BCOA's own bargaining position.

CONCLUSION

The BCOA accuses the district court of choosing a desired social result and bending the facts and the law to fit that result. Nothing could be further from the

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[18] BCOA is authorized by the agreement to increase contribution rates for all signatory employers in order to implement the guarantee of benefits.

[19] See, *United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators Association*, 890 F.2d 177 (D.C. Cir. 1990). Similar litigation has now been filed on behalf of the 1974 Benefit Plan, and the district court has granted preliminary injunctive relief requiring additional contributions.

truth. The district court's opinion carefully examined the agreements and bargaining history of the parties, recognized the fundamental problems with the BCOA's interpretation of the evidence, and found that the evidence supported the position of the UMWA and the individual pensioners that they were entitled to benefits and that the 1974 Benefit Plan was continued in 1978 for the purpose of ensuring that pensioners received the benefits they were promised. The district court's conclusions were fully in accord with the opinions of every other court which has construed those documents and examined that bargaining history, and fully consistent with governing precedent.

BCOA also complains of the "short shrift" its appeal received from the Court of Appeals. It is evident that the Third Circuit simply recognized the appeal for what it was: an effort to reargue the facts found by the district court, presenting no legitimate or significant question of law.

The decision of the district court was clearly supported by the evidence, and was properly affirmed by the Court of Appeals. The petition for certiorari should be denied.

Respectfully submitted,

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